UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
SAN FRANCISCO DIVISION OF JUDGES

GUBAGOO, INC.

and **Cases 28-CA-203713**

DANIEL BARTOLO, an Individual

GENERAL COUNSEL'S BRIEF TO THE ADMINISTRATIVE LAW JUDGE

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I. INTRODUCTION

Employees have a right to invoke the protection of the National Labor Relations Board without fear of retaliation. Gubagoo, Inc.'s (Respondent) former employee, Daniel Bartolo (Bartolo), was not so fortunate. Almost immediately after speaking up to his supervisor, saying that he would report the company to the "Labor Board" for being treated unfairly, Bartolo was threatened, and then unexplainably fired. Yes, far from "the Good," this case represents "the Ugly" and "the Bad" incorporated right into the company's name.[1]

II. STATEMENT OF THE CASE

This case was heard before Administrative Law Judge Eleanor Laws (the ALJ) on March 13, 2018.[2] The Complaint and Notice of Hearing (the Complaint) alleges, in sum, that Respondent violated Section 8(a)(1) of the National Labor Relations Act (the Act) by maintaining an overly-broad confidentiality provision and making coercive statements to employees. The Complaint also alleges that Respondent discharged employee Daniel Bartolo in violation of Section 8(a)(4) of the Act. Issues of jurisdiction and supervisory status were resolved at the outset of the hearing by joint stipulation of the parties. Tr. 9:8-10:9.[3]

[1] As explained by Respondent's witness, "Gubagoo" is "an acronym that stands for the Good, the Ugly, the Bad, and the Awesome in our dealers' website traffic and the 'goo' represents stickiness, how [Respondent] convert[s] that web traffic into leads." Tr. 101:19-102:1.

[2] All dates refer to 2017 unless otherwise noted, as here.

[3] "Tr. _:___" refers to transcript page followed by line or lines of the transcript of the unfair labor practice hearing; "GC Ex.___" refers to General Counsel's Exhibit followed by the exhibit number; "R Ex.___" refers to Respondent's Exhibit followed by exhibit number; "R. Br. at __" refers to Respondent's Post-Hearing Brief to the Administrative Law Judge followed by the page number.

III. ANALYSIS OF THE FACTS

A. Respondent's Operations

1. Respondent's Business Operations

Respondent is in the business of selling web-based chat platforms and other products in the niche market of automobile dealerships. Tr. 100:9-24. In doing so, Respondent maintains an outside sales force of about 10 to 13 Regional Sales Managers or Directors who work remotely and are each responsible for a specific sales territory. Tr. 102:23-106:2. From about April 2017 through at least July 2017, the company offered several products including Chat, ResQ, and TalkSmart. GC Ex. 2; GC Ex. 4. These products are designed to convert web traffic on automobile dealership websites into leads for the dealer. Tr. 100:19-101:8. Respondent also has two facilities in Florida where, presumably, the remaining 400 employees perform call-center type work to support the chat platforms under contract with various car dealerships. Tr. 100:3-8; 101:9-11.

2. Respondent's Supervisory Hierarchy

Peter Orlando (Orlando) has been Respondent's Vice President of Sales since 2013. He is responsible for the overall growth of the company and oversees all of the company's sales. Tr. 102. The Sales Directors report to Orlando. Orlando reports to the President and CEO, Brad Title (Title). On about July 18 or 19, Respondent hired Aaron Sheeks as its National Sales Manager.[4] Tr. 117-118. While the record is unclear as to Sheeks' full scope of authority or responsibilities, during material times, Sheeks participated in training the Sales Directors and frequently spoke with Orlando.

[4] Respondent stipulated that as of Sheeks' arrival on about July 18 or 19, he was a statutory supervisor and agent under Sections 2(11) and 2(13) of the Act. Tr. 9-10.

3. Respondent's Employment Contracts

As mentioned above, Respondent employs a team of Sales Managers or Directors. Upon hiring, this class of employees is subject to Respondent's "Private & Confidential Employment Agreement." Tr. 10:10-20; 18:21-19:20; GC Ex. 2. As related to this matter, under the terms of the agreement, employees are prohibited from disclosing confidential information to "any unauthorized person" or using such information, either "directly or indirectly, for [their] own account . . . without the written consent of [Respondent]." GC Ex. 2 at 6. By the terms of the agreement, "confidential information" is defined to specifically include, among other items, "employee . . . lists and personnel information of employees" and "numbers and location of sales representatives." GC Ex. 2 at 5.

Respondent did not provide any record evidence showing its justifications for maintaining the above terms within its employment contracts.

B. Bartolo's Employment History and Events Leading Up to His Protected Activity

1. Bartolo's Employment History

Respondent hired Daniel Bartolo in late March 2017 to work as a Sales Director covering the west territory.[5] Working remotely from his home in Arizona, Bartolo was responsible for contacting dealerships and automobile brokers in an effort to sell those entities the various products offered by the company. Tr. 20; 104-106.

The sales process can be summarized as follows. First, Bartolo and the other Sales Directors would make contact, usually over the phone, with a dealership and log each call in a CRM system referred to as "BIG." The goal of the initial call is to set an appointment for a "demo." If a demo was scheduled, the Sales Director would complete the demo on the scheduled

[5] According to Orlando, the west territory includes Arizona, New Mexico, Washington, Oregon, Idaho, Colorado, North Dakota, and South Dakota. Tr. 105:3-10.

date via video conferencing technology. Tr. 20; 22-23; 109-112. During a demo, a Sales Director uses a Power Point presentation provided by Respondent, which includes 70 slides, showing the features and benefits of the company's products. Finally, the demo is expected to conclude with the closing of the sale. Tr. 107.

After being trained, Respondent expected Bartolo to reach a quota of ten billable chat contracts each month. Tr. 108:10-22. Bartolo did not reach these expectations during the months of May or June. GC Ex. 4 at 1-2. However, although Bartolo readily admitted his shortcomings (*See* R Ex. 1; R Ex. 2), Respondent did not provide any evidence showing that Bartolo was counseled, disciplined, or otherwise reprimanded for not reaching his sales goals during that time period.

In fact, rather than give up on Bartolo's potential, Respondent's President and CEO decided to further invest in Bartolo. Sometime in June, Orlando recommended to Title that they terminate Bartolo. In response, Title instructed Orlando not to fire Bartolo because Respondent's upcoming sales conference was being held the following month in July.[6] Tr. 114:4-14.

2. Respondent Holds Its Sales Conference in Florida

Bartolo's sales numbers were not the only ones waning leading up to July. As Orlando explained, Respondent held a sales conference in Florida beginning about July 18 or 19 because Respondent "really needed to change [its] number around." Tr. 117:16-20. To support this effort, Title and Orlando completely revamped the Power Point presentation that Sales Directors were using to pitch the products. This new strategy was unveiled at the conference. Tr. 117:18-23.

[6] Respondent likely paid for Bartolo's travel expenses as Orlando testified that "we [i.e. Respondent] changed his ticket." Tr. 122:21-24.

The beginning of the conference also marked the introduction of Aaron Sheeks (Sheeks) as Respondent's new National Sales Director. During the conference, Sheeks sat in on various meetings and discussions held by Orlando and Title with the Sales Directors about their performance. Tr. 117:3-118:9. As Orlando and Bartolo described, these meetings were harsh with Title stressing time management, being more strategic, and pointing out the poor job that they were doing. Tr. 25:8-13; 78:2-4; 118:10-16.

On several occasions during the conference, Bartolo raised questions about his job security with Orlando, knowing that his sales numbers in July had not improved. Orlando responded by reassuring Bartolo that he had nothing to worry about because the company had "pieces in place to help [him] succeed" and that is why they were at the conference. Tr. 78:2-11; *see also* Tr. 25:10-16; 26:7-13. As Bartolo testified, Orlando, in reassuring him that his performance would not get him fired, described the month as a "wash."[7] Tr. 78:2-11. Orlando denied describing the month as a wash,[8] but did not otherwise deny or contradict Bartolo's testimony regarding his reassurances that Bartolo was not about to get fired. Tr. 124:6-15.

The conference ended on Friday, July 21. Prior to its conclusion, Orlando announced that the Sales Directors would be required to attend mandatory videoconference meetings beginning on the following Monday, July 24 through the rest of that week in order to "get certified" on the new Power Point that was unveiled at the conference. Tr. 119:4-16. The meetings were to be held at 5:00 a.m. local time for Bartolo in Arizona. Tr. 28:7-14; 119:9-13.

[7] Bartolo's testimony about Orlando's reassurances and that the month was a "wash" is corroborated by a subsequent email that Bartolo sent Orlando in which he recounts the conversation. See R Ex. 5.

[8] Orlando's denial is incredible which colors his overall credibility. If, as Orlando testified, that telling Bartolo that July was a wash is the "last thing" he would ever say (Tr. 124:6-15), one would expect him to respond to Bartolo's email shortly after the conference in which Bartolo stated, "I also thought you said this month was a wash and to work [with] Aaron and focus on next month." R Ex. 5. However, there is no evidence showing that Orlando attempted to correct Bartolo in any way.

Title and Orlando also discussed that the Sales Directors[9] were expected to make phone calls on the following Saturday, July 22. Tr. 26:17-22; 121:7-11. After hearing this, Bartolo reminded Orlando that he could not make calls on Saturday because he planned on celebrating his parents' 50th wedding anniversary with them. Tr. 26:17-27:17. Orlando admitted having a conversation with Bartolo about making calls on Saturday, but his testimony lacks any details about what was actually said except that someone[10] said that the anniversary was on Friday, not Saturday. Tr. 122:10-24. However, it is implausible that Bartolo intended to celebrate with his parents on the same day that he was scheduled to take a cross-country flight leaving late in the afternoon.

3. Respondent Issues Bartolo a Performance Improvement Plan on July 24

As announced, Respondent held a videoconference meeting with all the Sales Directors early Monday morning, on July 24. Tr. 28:7-17. Title[11] and Orlando conducted the meeting, which began with Orlando discussing who made calls on Saturday. Bartolo and another Sales Director admitted that they did not make calls. In response, Title "chimed in" that they would be put on a performance plan. The meeting continued with training on the new Power Point. Sheeks was also present for the meeting. Tr. 28:18-29:17.

After the call on July 24, Respondent followed through and placed Bartolo on a performance improvement plan (PIP). Tr. 29:18-30:22. Orlando, copying Title and Sheeks, sent Bartolo an email outlining the requirements as follows:

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[9] Orlando testified that only the under-performers were given this instruction (Tr. 121:7-11), but his testimony does not square with his follow-up email dated July 24 sent to the entire sales team inquiring about who made calls on Saturday. See R. Ex. 5 at 2; Tr. 63:17-64:10; 122:25-123: 9.

[10] The record is unclear whether Orlando meant that he said this or that Bartolo said this.

[11] Orlando denied that Title was present for the meeting. However, to the extent that this fact is material or weighs on credibility, the ALJ should draw an adverse inference because Respondent failed to corroborate Orlando's testimony with the testimony of any other supervisor alleged to have been present.

1) Meet your weeks forecast of 2 sold chat deals from July 24 to 28th
2) Personally scheduling a minimum of 5 demo's a week and completing 5 demos a week
3) 50 logged calls in BIG each day of the week
4) 10 billable sold chats deals in August

Bartolo responded to Orlando's email acknowledging the requirements and stating that he felt like he was being targeted, which created a "very hostile environment." GC Ex. 3.

C. Bartolo Threatens to Report Respondent to the Labor Board on July 25[12]

The following day, on July 25, Respondent held another early morning videoconference meeting. According to Bartolo, he woke up late after receiving a text from Sheeks inquiring about why he was not connected to the meeting. Bartolo joined the meeting about 15 minutes late. During this meeting, the Sales Directors spent about an hour role playing with the new Power Point. Tr. 32:9-33:7.

Orlando testified that Bartolo never attended this meeting, and, as discussed below, decided to discharge Bartolo, in part, for missing the meeting. Tr. 127:19-128:4; 153:5-23. However, the ALJ should credit Bartolo for several reasons. First, Orlando's testimony is implausible. He would have the ALJ believe that although Bartolo's absence from the meeting was a factor in deciding to discharge him, he never even spoke with Bartolo about his alleged absence. One would expect a supervisor to address serious performance issues such as missing a mandatory training meeting with an employee who was on a PIP.

Second, Respondent could have corroborated Orlando's testimony but failed to do so. Although Respondent provided reasons for Sheeks' absence at the hearing, Respondent withdrew its motion seeking permission to have him testify telephonically or via videoconference. Even after the ALJ offered to reconsider the issue, suggesting that scheduling another day for his

[12] The Complaint alleges that the violations occurred on "About July 24," but the record is clear that the events took place on precisely, July 25.

appearance was an option, Respondent made no further attempts to provide Sheeks' testimony. Tr. 7:22-9:7. This should lead the ALJ to draw an adverse inference, finding that Sheeks would not have been able to corroborate Orlando's testimony that Bartolo did not attend the July 25 meeting, or missed any other meeting for that matter. Accordingly, the ALJ should credit Bartolo's testimony that he was late, but did not miss this or any other meeting.

Shortly after the meeting on Tuesday, July 25, Sheeks met with Bartolo over videoconference. They discussed Bartolo showing up late to the meeting and the terms of the performance plan such as what Bartolo would have to do to hit the requirements, including logging calls in BIG. They also discussed Bartolo's upcoming demos. Finally, Sheeks reassured Bartolo that he would not get fired. Tr. 33:13-34:2.

After his conversation with Sheeks, Bartolo started mulling over the situation and what was being required of him. Then, he sent an email to Orlando and Sheeks, stating that he felt like he was being targeted and that based on everything that happened in Florida (i.e. the reassurances he received from Orlando), that being put on a performance plan was extremely unfair. Bartolo also stated that if he got fired for something he did not do, and because he was being targeted, it would be unlawful and he would contact the Labor Board.[13] Tr. 34:5-13; 85:22-87:14.

Shortly after Bartolo sent the email described above, Sheeks called Bartolo. First, Sheeks asked Bartolo what was wrong and said he wanted to address the email. Tr. 34:20-35:2; 35:22-25; 87:18-19. Bartolo explained that he felt like he was being treated unfairly because it

[13] This email was not introduced into the record because, as Bartolo explained, he sent it using Respondent's email server and no longer had access. Tr. 34. Orlando denied ever receiving such an email and Respondent argues in its brief, that Respondent was unaware of any other email and that it produced the only email ever received including a threat from Bartolo. See Respondent's Post Hearing Brief at 20; R. Ex. 7. However, Respondent's argument is not supported by the record. Respondent offered no testimony regarding whether a search on its email server for this email was ever conducted or even whether the emails it offered were the only ones found. Moreover, Sheeks did not testify as to whether he ever received such an email.

seemed like he was about to get fired which contradicted everything Orlando told him in Florida at the sales conference. Tr. 35:2-5; 87:19-25. Bartolo explained that he was frustrated and upset about the new PIP requirements. Tr. 35:4-5; 87:23-25. Then, Bartolo told Sheeks that if he got fired, he would contact the Labor Board. Tr. 35:5-6; 87:25-88:2.

Sheeks responded by saying that the Labor Board could not do anything because Bartolo signed an employment contract and that Arizona is a right-to-work state, meaning that he could be fired at any time.[14] Tr. 35:6-10; 88:2-6. Bartolo countered by stating that there were still regulations that the company needed to follow and that they were being unfair to him. Tr. 35:9-12; 88:6-8. Bartolo reiterated that he would call the Labor Board and Sheeks quickly put that idea to rest by saying that if Bartolo did, they would make sure he never got a job in the auto industry again. Tr. 35:12-14; 88:8-11. Then, Bartolo asked if the company would contact his friends at the car dealerships. Tr. 35:14-16; 88:11-13. At that point, Sheeks diffused the situation by telling Bartolo to calm down, to stay focused, and that he was showing improvement so he had nothing to worry about. Tr. 35:16-20; 88:13-16.

The ALJ should credit Bartolo's testimony with regard to his conversation with Sheeks. Most notably, Bartolo's testimony never wavered on cross-examination with regard to the content of the conversation. A close comparison of his testimony on direct and cross-examination shows a remarkably similar recollection of the conversation in both detail and sequence of events, which is highlighted by the above citations. Furthermore, Sheeks was not called to testify about this critical conversation.

[14] It is immaterial that this is not what "right-to-work state" means.

D. Respondent Abruptly Discharges Bartolo on July 27

1. Respondent Discharges Bartolo and Offers Different Reasons

Less than two full days after Bartolo threatened to contact the Labor Board, Orlando fired him on the morning of July 27. Tr. 49:22-24 (Bartolo identifying his telephone number); 128:19-20; GC Ex. 6 at 2 (call to Bartolo at 9:03 a.m.). Orlando testified that he thought about firing Bartolo the night before, and woke up the next morning and made the decision to follow through with it.[15] Then, Orlando called Bartolo and told him that he was terminated and explained that he would get paid after he returned the company's equipment. Tr. 36:21-37:3.

Although he did not provide Bartolo a reason for being discharged, Respondent contends that the decision was based on Bartolo's performance. However, scrutiny of Orlando's testimony (at the hearing and within a previously sworn statement before a Board agent), shows discrepancies in what performance issues were at the root of the decision, if any. On direct examination, Orlando stated that he decided to discharge Bartolo because (1) Bartolo missed a meeting and was late to another one; (2) Bartolo only completed one demo for the week; and (3) Bartolo had only scheduled two demos for the week. In regards to demos, Orlando also testified on direct that he considered the whole month of July without any elaboration. According to Orlando, based on the above, he determined that there was no way Bartolo could be successful in his position. Tr. 128:20-129:6.

Then, on cross-examination, Orlando revealed that he provided other reasons for discharging Bartolo during the course of the investigation: reasons that do not square with documentary evidence. For example, Orlando testified in an affidavit that prior to discharging Bartolo, he reviewed Bartolo's call logs and noticed that Bartolo had logged hundreds of calls in a day. Although it took a few rounds of questioning with evasive answers, Orlando eventually

[15] Orlando's testimony on his decision to fire Bartolo is further discussed in the section below.

admitted that he further testified in his affidavit that that was one of the reasons he decided to discharge Bartolo. Orlando's evasiveness was grounded in the fact that Bartolo simply had not logged hundreds of calls in a day. Rather, in less than four full work days that week, Bartolo logged 164 calls, which, is consistent with his PIP requirement of 50 logged calls per day. Notably, Orlando even admitted at the hearing that such a call volume was not unusual. Tr. 141:6-142:14.

With regard to Bartolo's number of logged calls and how it influenced his decision, Orlando described what he saw as "fraudulent." He explained that when he saw the 164 calls logged, he thought it was "very fraudulent" because of the fact that it was such a high volume compared with Bartolo's previous call log history. Tr. 133:6-15; 138:6-10. According to Orlando, it never dawned on him that Bartolo was simply logging more of the calls that he was making.[16] Tr. 138:6-17. Orlando's testimony on this point highlights his credibility issues. Curiously, Orlando specified in Bartolo's PIP to log calls in BIG, but did not include the same requirement for another employee who received a similar PIP on the same day. *Compare* GC Ex. 3 *with* R Ex. 8 at 2. This suggests that Orlando was tuned in to the fact that Bartolo was not logging the calls he made prior to issuance of the PIP. Thus, Orlando's testimony on this issue is exaggerated, implausible, and not worthy of credence.

Orlando also admitted that his prior affidavit was less than forthcoming with regard to another reason he gave during the investigation for discharging Bartolo. Orlando previously testified that he discharged Bartolo because he had not scheduled *any* demos that week. But, as records would likely show and as Orlando admitted, that was not true. Bartolo had actually

[16] Bartolo's call log shows that during some previous weeks he logged as few as zero calls in a week. GC Ex. 4 at 4. It is hard to believe that Orlando would have compared these call volumes and concluded that Bartolo was not actually making any calls during certain weeks, when Bartolo's primary responsibility was to make calls. Rather, common sense would point anyone in the direction of the truth, as Bartolo explained, that because of the PIP requirements, he was following through with logging the calls he made. Tr. 38-40.

scheduled two demos that week. Tr. 139:1-141:5. Orlando quipped that even two is "extremely low" and "not even acceptable." Tr. 141:3-5. However, two scheduled demos in less than four days since receiving the PIP, is near the goal Orlando placed on Bartolo of five for the week. *See* GC Ex. 3.

Finally, when pressed at other times for the reasons he discharged Bartolo, Orlando explained that it was because of Bartolo's "overall performance for the last [four] months" and missing the mandatory meeting and being late to another. Tr. 137:22-138:5; 153:6-10. However, Orlando admitted that aside from allegedly missing the meeting and being 15 minutes late to another 5:00 a.m. meeting, the other reasons he provided were the same reasons Bartolo was placed on the PIP in the first place. Tr. 138:1-5.

2. Orlando's Denial of Knowing that Bartolo Threatened to Contact the Labor Board Should Not Be Credited

Orlando denied knowing that Bartolo made any threats to "file any type of charge with the Labor Board" prior to making the decision to discharge him. Tr. 129:21-130:9. To further insulate his decision from Bartolo's protected activity, Orlando testified that he did not even discuss his decision to discharge Bartolo with either Sheeks or Title. Tr. 129:14-20. However, this testimony as a whole is implausible for the following reasons.

First, although Orlando has the authority to discharge employees, he usually runs those decisions by Title. Tr. 136:6-11. Aside from Orlando's admission on this point, his general practice is evidenced by the fact that he had already raised the issue of discharging Bartolo to Title in June. Tr. 136:12-17. As discussed above, Title vetoed Orlando's recommendation at that time. It is unlikely that Orlando would not have run the second decision by Title given that Title had invested so heavily in Bartolo's potential once before.

Second, Orlando contradicted himself when he was pressed about whether he had even discussed Bartolo's performance issues (the purported basis for the discharge) with anyone leading up to the discharge. At first instance, Orlando stated that he did not talk to anyone about Bartolo's performance during that time. Tr. 137:1-5; 137:12-14. But within the same thought pattern, Orlando stated that he "constantly talked to [Title] about all our people" and that they "have constant conversations around them." Tr. 137:6-9.

Returning to the subject of whether he spoke with Sheeks about Bartolo's performance leading up to the discharge, Orlando first responded with, "I'm going to have to say I mean I really don't recall." Tr. 154:9-13. Then, in the same breadth, Orlando admitted that he talked with Sheeks about Bartolo's alleged absence at the meeting, but stated that he did not speak with Sheeks about Bartolo's overall numbers. Tr. 154:13-16.

Third, phone records show a high volume of calls between Sheeks and Orlando between July 25 (the day Bartolo threatened to contact the Labor Board) and the morning of July 27, when Bartolo was discharged. For example, eight phone calls were made on July 25 between Sheeks and Orlando, with all except one call being made in the afternoon. GC Ex. 6 at 1-2 (Orlando's phone record showing calls from Sheeks' number notated on GC Ex. 8). After Orlando's final conversation with Sheeks on July 25 at 6:17 p.m., Orlando immediately called Title. GC Ex. 6 at 2.

Records for July 26 show five calls between Orlando and Sheeks. GC Ex. 6 at 2. Records also show eight calls on that day between Orlando and Title. GC Ex. 6 at 2. Notably, five of these calls occurred in the evening when Orlando admitted (on cross-examination) that he was thinking about discharging Bartolo but denied speaking with anyone about the decision or Bartolo's underlying performance issues. Tr. 136:21-25; 137:12-20; GC Ex. 6 at 2.

Then, on the morning that Orlando discharged Bartolo, July 27, records show several more calls between Orlando and Sheeks and Title prior to Orlando's call to Bartolo. GC Ex. 6 at 2. Given the high volume of calls between Respondent's supervisors from the time Bartolo threatened to contact the Labor Board until the time Bartolo was discharged, it is beyond unlikely or implausible that Orlando would not have discussed (1) Sheeks' uncontroverted July 25 conversation with Bartolo or (2) Orlando's decision to discharge him.

For the forgoing reasons, the ALJ should discredit Orlando's self-serving denial that he knew Bartolo threatened to contact the Labor Board. The ALJ should also discredit Orlando's testimony that he did not speak with anyone about his decision to discharge Bartolo.

3. Record Evidence Shows That Bartolo Was Treated Disparately

Contrary to Orlando's generalized (and inconsistent) testimony about whether other employees have been discharged for similar performance issues, the record shows that Bartolo was treated differently than other employees. On direct examination, Orlando testified that he "terminated six people in the last year" for poor performance. Tr. 130:14-23. Orlando testified that there was "another two" that he transferred to a different department for the same reasons. Tr. 130:20-23. However, when pressed for more details on who was discharged and when, Orlando was unable to name six individuals who he had fired and admitted that all but one of them were discharged after Bartolo was. Tr. 149:19-150:17. Aside from Orlando's testimony simply stating that others were fired for "poor performance," the record is void of any evidence showing the underlying facts of any such terminations. Thus, these comparators should be given little to no weight.

On the other hand, the record shows that employee Jason Jones (Jones) was treated differently than Bartolo. Jones, like Bartolo, was placed on a PIP on July 24. The terms of his PIP included the following:

1) Meet your weeks forecast of 4 sold chat deals from July 24th to 28th
2) Personally scheduling a minimum of 5 demos a week and completing 5 demos a week
3) 10 billable sold chats in August

See R Ex. 8 at 2. Orlando was unable to verify whether Jones even met his PIP requirements in place for the last week of July – four sold chat deals. Even more telling, Orlando was evasive, at best when questioned on the topic. When asked how many sales Jones had the last week of July, Orlando boasted about the number of sales Jones had within the four months leading up to the hearing. When redirected to the actual question, Orlando admitted he did not know how many sales Jones had during the PIP period. Then, when asked whether it was possible Jones had less than four, Orlando answered non-responsively with "I can't recall." Tr. 150:22-17.

Respondent asserts, in its brief, that Jones "*immediately* improved his performance" following the PIP. R. Br. at 12 (citing Tr. 125) (emphasis added). Not surprisingly though, the testimony cited by Respondent does not support its contention, and rather, offers another example of Orlando's unwillingness to address Jones' performance during the time period of his PIP. Tr. 125:1-3 ("Absolutely. *A year later*, now he's our top salesperson." (emphasis added)).

In short, Respondent did not provide *any* evidence about whether Jones ever met his PIP requirements or whether he was on track to do so at the time that Orlando discharged Bartolo. However, the record shows that Jones was at least given the opportunity to do so as he is still employed by the company. Moreover, because Respondent chose not to present evidence in its possession concerning the number of sales Jones had during the term of his PIP and Orlando's

obfuscations about Jones' performance during the relevant time period, it should be inferred that Jones did not meet the requirements of the PIP.

IV. LEGAL ANALYSIS

A. Sheeks' Statements to Bartolo Violated Section 8(a)(1) of the Act

1. Legal Standard

Section 8(a)(1) of the Act prohibits employers from interfering with, restraining, or coercing employees in the exercise of their rights guaranteed in Section 7 of the Act. *See* 29 U.S.C. § 158(a)(1). The basic test for a violation of Section 8(a)(1) is whether under all the circumstances the employer's conduct would reasonably tend to restrain, coerce, or interfere with employees' rights guaranteed by the Section 7 of the Act. *Mediplex of Danbury*, 314 NLRB 470, 472, (1994); *Sunnyside Home Care Project*, 308 NLRB 346 fn. 1 (1992), citing *American Freightways Co.*, 124 NLRB 146, 147(1959). Further, "it is well settled that the test of interference, restraint, and coercion under Section 8(a)(1) of the Act does not turn on the employer's motive or on whether the coercion succeeded or failed." *American. Tissue Corp.*, 336 NLRB 435, 441 (2001) (citing *NLRB v. Illinois Tool Works*, 153 F.2d 811, 814 (7th Cir. 1946)).

2. Sheeks' "The Labor Board Can't Do Anything" Statement Violated the Act

Based on Bartolo's consistent and uncontroverted testimony, Sheeks told Bartolo that the Labor Board could not do anything because Bartolo signed an employment contract and that Arizona is a right-to-work state, meaning that he could be fired at any time. Such a statement conveying that it would be futile to file charges with the Board violates Section 8(a)(1) of the Act. *Pam American Grain Co., Inc.*, 343 RNLB 205, 226, 230 (2004); *Acme Datsun*, 263 NLRB 570, 576 (1982), *enfd. sub nom. ACME Motors, Inc. v. NLRB*, 716 F.2d 889 (3d Cir. 1983);

Transportation Management Corp., 258 NLRB 363, 363 n. 1, 370, 372 (1981), *affd.* 692 F.2d 74 (1st Cir. 1982). Accordingly, the ALJ should sustain the Complaint allegation.

3. Sheeks' Threat to Black-Ball Bartolo in the Industry Violated the Act

Sheeks also told Bartolo that if he contacted the Labor Board, he would make sure that Bartolo never worked in the auto industry again. Threats of negative consequences, including black-balling, for pursuing charges with the Board violate Section 8(a)(1) of the Act. *Postal Service*, 350 NLRB 125, 125-126 (2007), enfd. 526 F.3d 729 (11th Cir. 2008); *East Texas Pulp & Paper Co*., 143 NLRB 427, 446 (1963). Accordingly, Sheeks' threat of black-balling if Bartolo contacted the Labor Board violated the Act.

B. Respondent Discharged Bartolo in Violation of Section 8(a)(4) and (1) of the Act

1. Legal Standard

Section 8(a)(4) of the Act protects employees' rights to file charges or give testimony to the National Labor Relations Board. The scope of protection afforded by this section of the Act is to be broadly construed. *NLRB v. Scrivener*, 405 U.S. 117, 122 (1972). As such, the Board has consistently found that employee threats to bring disputes before the "Labor Board" are protected under Section 8(a)(4). *See Grand Rapids Die Casting Corp.*, 279 NLRB 662, 664 (1986); *Overseas Motors, Inc.*, 260 NLRB 810, 813-14 (1982); *First National Bank & Trust Co.*, 209 NLRB 95, 95 (1974); *Mitsubishi Aircraft International, Inc.*, 212 NLRB 856, 866 (1974). Thus, it is an unfair labor practice for an employer to take action against an employee for engaging in such conduct.

Section 8(a)(4) violations are analyzed under the *Wright Line* framework. *American Gardens Management Co.*, 338 NLRB 644, 645 (2002). Under that framework, the General Counsel must demonstrate by a preponderance of the evidence that the employee was engaged in

protected activity, that the employer had knowledge of that activity, and that the employer's hostility to that activity "contributed to" its decision to take an adverse action against the employee. *Director, Office of Workers' Comp. Programs v. Greenwich Collieries*, 512 U.S. 267, 278 (1994), clarifying *NLRB v. Transportation Mgt.*, 462 U.S. 393, 395, 403 n.7 (1983); *Wright Line*, 251 NLRB at 1089.[17]

Evidence that may establish a discriminatory motive – *i.e.*, that the employer's hostility to protected activity "contributed to" its decision to take adverse action against the employee – includes:

(1) statements of animus directed to the employee or about the employee's protected activities (*see, e.g., Austal USA, LLC*, 356 NLRB 363, 363 (2010) (unlawful motivation found where human resources director directly interrogated and threatened union activist, and supervisors told activist that management was "after her" because of her union activities));

(2) statements by the employer that are specific as to the consequences of protected activities and are consistent with the actions taken against the employee (*see, e.g., Wells Fargo Armored Services Corp.*, 322 NLRB 616, 616 (1996) (unlawful motivation found where employer unlawfully threatened to discharge employees who were still out in support of a strike, and then disciplined an employee who remained out on strike following the threat));

(3) close timing between discovery of the employee's protected activities and the discipline (*see, e.g., Traction Wholesale Center Co., Inc. v. NLRB*, 216 F.3d 92, 99 (D.C. Cir. 2000) (immediately after employer learned that union had obtained a majority of authorization cards from employees, it fired an employee who had signed a card));

[17] The *Wright Line* standard upheld in *Transportation Mgt.* and clarified in *Greenwich Colleries* proceeds in a different manner than the "prima facie case" standard utilized in other statutory contexts. *See Reeves v. Sanderson Plumbing Products, Inc*., 530 U.S. 133, 142-43 (2000) (applying Title VII framework to ADEA case). In those other contexts, "prima facie case" refers to the initial burden of production (not persuasion) within a framework of shifting evidentiary burdens. In the context of the Act, by contrast, the General Counsel proves a violation at the outset by making a persuasive showing that the employer's hostility toward protected activities was a motivating factor in the employee's discipline. At that point, the burden of persuasion shifts to the employer to prove its affirmative defense. Because *Wright Line* allocates the burden of proving a violation and proving a defense in this distinct manner, references to the General Counsel's "prima facie case" or "initial burden" are not quite accurate, and can lead to confusion, as General Counsel's proof of a violation is complete at the point where the General Counsel establishes by a preponderance of the evidence that employer's hostility toward protected activities was a motivating factor in the discipline.

(4) the existence of other unfair labor practices that demonstrate that the employer's animus has led to unlawful actions (*see, e.g.*, *Mid-Mountain Foods*, 332 NLRB 251, 251 n.2, *passim* (2000), *enfd. mem.*, 11 Fed. Appx. 372 (4th Cir. 2001) (relying on prior Board decision regarding respondent and, with regard to some of the alleged discriminatees, relying on threatening conduct directed at the other alleged discriminatees)); or

(5) evidence that the employer's asserted reason for the employee's discipline was pretextual, such as disparate treatment of the employee, shifting explanations provided for the adverse action, failure to investigate whether the employee engaged in the alleged misconduct, or providing a non-discriminatory explanation that defies logic or is clearly baseless (*see, e.g.*, *Lucky Cab Company*, 360 NLRB 271 (2014); *ManorCare Health Services – Easton*, 356 NLRB 202, 204 (2010); *Greco & Haines, Inc.*, 306 NLRB 634, 634 (1992); *Wright Line*, 251 NLRB at 1088, n.12, *citing Shattuck Denn Mining Co. v. NLRB*, 362 F.2d 466, 470 (9th Cir. 1966); *Cincinnati Truck Center*, 315 NLRB 554, 556-57 (1994), *enfd. sub nom.*, *NLRB v. Transmart, Inc.*, 117 F.3d 1421 (6th Cir. 1997)).

Once the General Counsel has established that the employee's protected activity was a motivating factor in the employer's decision, the employer can nevertheless defeat a finding of a violation by establishing, as an affirmative defense, that it would have taken the same adverse action even in the absence of the protected activity. *See NLRB v. Transportation Mgt.*, 462 U.S. at 401 ("the Board's construction of the statute permits an employer to avoid being adjudged a violator by showing what his actions would have been regardless of his forbidden motivation"). The employer has the burden of establishing that affirmative defense. *Id*.

2. Bartolo Engaged in Protected Activity and Respondent Knew About It

As discussed in more detail above in Section III.C., respectfully, the ALJ should credit Bartolo's testimony with regard to his conversation with Sheeks on July 25 in which he threatened to report Respondent to the Labor Board and the email he sent to both Sheeks and Orlando moments before the conversation iterating the same. Thus, by virtue of sending the

email to Orlando, which contained a threat to contact the Labor Board, Respondent's purported decision maker was well aware of Bartolo's protected activity.

Even if it is found that Bartolo did not send a protected email to Orlando, the record otherwise shows sufficient evidence of knowledge. First, based on the uncontroverted testimony that Bartolo, in a telephone conversation, told Sheeks that he would contact the Labor Board, along with the constant communication amongst Sheeks and Orlando, the ALJ should infer knowledge or impute Sheeks' knowledge to Respondent. *State Plaza, Inc.*, 347 NLRB 755, 756-758 (2006); *Dobbs International Services*, 335 NLRB 972, 973 (2001).

Second, evidence suggests that the decision to discharge Bartolo was not as isolated as Orlando would have the ALJ believe,[18] which further supports a finding that supervisors knew of Bartolo's protected activity before he was discharged and that Respondent should be charged with such knowledge. The following factors support a finding that Orlando was not the sole decision-maker and that Orlando and others involved in making the decision to discharge Bartolo knew of Bartolo's statement to Sheeks about his intent to contact the Labor Board: (1) Orlando's wavering testimony about whether he spoke with Sheeks or Title about Bartolo's poor performance leading up to the discharge; (2) the unlikelihood that Orlando deviated from his general practice of consulting with Title prior discharging Bartolo; (3) phone records showing that Orlando spoke with Sheeks and Title on the eve and morning of Bartolo's discharge when Orlando was admittedly "thinking about" firing Bartolo; and (4) the adverse inferences that should be drawn based on Respondent's failure to call Title or Sheeks as a witness. While Sheeks' knowledge of Bartolo's statement about going to the Labor Board should be imputed to Respondent, and the evidence warrants a finding that Orlando himself knew of Bartolo's

[18] In brief, Respondent points out Bartolo's testimony that Sheeks was unaware of the discharge. However, this does not show that Sheeks did not have conversations with Orlando about Bartolo's performance leading up to the discharge and does not erase the fact that Sheeks failed to testify.

statement, even if Respondent had established that Orlando did not know of the statement, the influence of Sheeks and Title in the decision to discharge Bartolo would establish that Respondent had knowledge of Bartolo's statement for purposes of a *Wright Line* analysis. *See Jeff MacTaggert Masonry, LLC*, 363 NLRB No. 149, slip op. at 1 n.3 (2016) (Miscimarra, concurring, finding unlawful motivation based on the "cat's paw" theory of liability described in *Staub v. Proctor*, 562 U.S. 411 (2011), where one supervisor, motivated by discriminatory animus toward an employee's protected activity, caused another supervisor without knowledge of the protected activity to take adverse action against the employee).

Third, in addition to the circumstantial evidence discussed above, knowledge should be inferred from timing. *Metro Networks, Inc.*, 336 NLRB 63, 65 (2001), and cases cited therein. Here, Bartolo engaged in protected activity on July 25 and was discharged less than two days later on the morning of July 27, even though Bartolo's PIP contemplated a longer period for improvement. The immediacy of the timing (and constant communication amongst the supervisors within that short time period) shows knowledge.

Accordingly, even if the ALJ does not find direct evidence of knowledge, the record is teeming with circumstantial evidence indicating that Respondent was aware of Bartolo's protected activity before he was discharged. Respectfully, the ALJ should find that the General Counsel met her burden with regard to showing protected activity and knowledge under *Wright Line*.

3. Respondent Harbored Animus Toward Bartolo's Protected Activity

As discussed below, there are several factors indicating that Respondent was hostile towards Bartolo's protected activity. Specifically, Respondent offered shifting, false, and

exaggerated reasons for discharging Bartolo. In addition, suspicious timing and evidence of disparate treatment supports a finding of animus.

a. Suspicious Timing Shows Animus

Suspicious timing supports a finding of animus. *Reno Hilton Resorts v. NLRB*, 196 F.3d 1275, 1283 (D.C. Cir. 1999). Here, the timing of Bartolo's discharge strongly supports such a finding. Respondent discharged Bartolo less than 48 hours after he engaged in protected activity. The timing is even more suspicious because Respondent had recently issued Bartolo a performance improvement plan that contained a requirement that specifically targeted Bartolo's performance through the end of that week, July 28. Specifically, Bartolo's PIP required him to sell two chat platforms between July 24 and July 28. Notably, Bartolo was making progress to that end by scheduling demos before Respondent abruptly fired him without giving him the opportunity to meet the goal. This begs the question of why Respondent would not even wait out the terms of the PIP (terms created by the purported decision maker), especially if Bartolo was making strides toward meeting the goal.

Respondent will likely argue that the timing can be explained because, according to Orlando, Bartolo missed a mandatory meeting on July 25 and was late to one the following day. However, as discussed, Orlando's self-serving testimony was not corroborated by any other witness even though Sheeks was also present for the meeting and Orlando supposedly spoke with Sheeks about Bartolo's absence. Accordingly, the ALJ should find that Bartolo did not miss a meeting which undermines the only possible explanation of why Respondent was unwilling to wait out the terms of the PIP and fired Bartolo in haste.

b. Shifting and False Reasons Show Animus and Pretext

Shifting defenses and providing false reasons for taking an adverse action against an employee support a finding of animus and will show that an employer's justifications are pretextual. *Lucky Cab Company*, 360 NLRB 271, 274-75 (2014). Here, Respondent provided shifting and false reasons for discharging Bartolo. Setting aside the proffered reason that Bartolo missed a mandatory meeting (already discussed at length, *supra*), Respondent offered several other false reasons for discharging Bartolo. For example, Orlando testified under oath during the investigation of this matter that he decided to discharge Bartolo because he had logged hundreds of calls a day since receiving the PIP. However, Bartolo did not log hundreds of calls in a day. Rather, Bartolo logged 164 calls within just less than a four day period. Remarkably, this call volume is dead consistent with the PIP requirement of logging 50 calls per day. This is likely why Orlando omitted this as a reason for discharging Bartolo when he initially testified on direct examination about why he made the decision, which further supports a finding of pretext.

Additionally, Orlando testified during the investigation of this matter that he discharged Bartolo because he had not scheduled any demos since receiving the PIP. Again, this was proven untrue. Bartolo actually scheduled two demos since then. And, this is likely why Orlando shifted his reasoning with regard to the number of demos that Bartolo scheduled that week when testifying before the ALJ. After copping to the fact that he originally said he based his decision on the falsity that Bartolo had not scheduled any demos, Orlando double-downed, shifting to a wholly separate falsehood: that the fact that Bartolo had actually scheduled two demos was still "extremely low," even though it was coming close to reaching the requirement that Orlando himself imposed.

Further showing Respondent's shifting and false reasons for discharging Bartolo is Orlando's broadening of the basis for the decision throughout his testimony. When it became evident that hinging his decision on Bartolo's actual performance since the PIP was issued was not adding up, Orlando attempted to lodge his decision on Bartolo's "overall" performance since he was hired in April, whereas he initially testified at the hearing and in his affidavit (albeit, differently) with regard to performance issues he noticed since July 24. Not only does this illustrate Orlando's shifting tendencies, but it also sets forth another sinking rationale; Orlando placed Bartolo on the PIP for his overall performance, so that fails to explain why it would provide a basis for such a swift decision to discharge him just days later.

For the forgoing reasons, the ALJ should find that Respondent provided false and shifting reasons for discharging Bartolo, which supports a finding of animus and pretext.

c. Disparate Treatment Shows Animus and Pretext

Respondent's disparate treatment of Bartolo is highly indicative of Respondent's unlawful motive. Prior to Bartolo's protected activity, he and another employee were placed on similar PIPs at the same time. Bartolo, unlike the other employee who is not alleged to have engaged in any protected activity, was not given the opportunity to meet the first phase of requirement. However, employee Jones was given the opportunity to meet his requirements and it is, at best, unknown whether he actually met them. This shows that for some reason – *i.e.*, Bartolo's protected activity – Respondent did not afford Bartolo the same opportunity to improve under the plan. Rather, Respondent, without justification, cut Bartolo's terms short. Accordingly, the ALJ should find that Respondent treated Bartolo differently than the best known comparator which supports a finding of animus and pretext.

d. Respondent's Exaggerations Show Animus

An employer's exaggerated reasons for taking adverse action against an employee supports a finding of animus and pretext. *See Key Food*, 336 NLRB 111, 114 (2001) (finding false and exaggerated reason was evidence of pretext and insufficient for meeting employer's *Wright Line* burden). Here, as discussed, Orlando exaggerated in describing Bartolo's performance with regard to call volume leading up to the discharge. To that end, he exaggerated when he gave testimony during the investigation by stating that Bartolo logged hundreds of calls in a day. Then, at the hearing, he described Bartolo's logged calls as "very fraudulent" because of the massive spike in logged calls. However, Bartolo did not log hundreds of calls in a day and the spike in logged calls was wholly consistent with the new requirement imposed by Orlando. Thus, Orlando's exaggerations, in an attempt to color both his decision to discharge Bartolo and whether Bartolo was actually making improvements in his performance, should be viewed as a failed effort to hide Respondent's unlawful motivation.

e. Contemporaneous Unfair Labor Practices Show Animus

Contemporaneous unfair labor practices support a finding of animus. *Bates Paving & Sealing, Inc.*, 364 NLRB No. 46, slip op. at 4 (2016). Here, Sheeks' statements, discussed above, independently violate the Act and were made less than two days prior to Bartolo's discharge. Given the proximity in time, and nature of the statements, the ALJ should find that those unfair labor practices further support a finding of animus.

Accordingly, and for all the reasons discussed above, the ALJ should find that Respondent harbored animus toward Bartolo's protected activity, was unlawfully motivated in deciding to discharge Bartolo, and that the record shows that Respondent's justifications for taking action are steeped in pretext.

4. Respondent's Reasons for Discharging Bartolo are Pretext, and Respondent Therefore has not met Its Burden of Proving It Would Have Taken the Same Action Regardless of Bartolo's Protected Activity

Although Respondent offered several (and often shifting or conflicting) potentially legitimate reasons for discharging Bartolo, it wholly failed in meeting its burden of proof. Respondent's defenses simply do not add up or were proven otherwise as discussed at length above. Thus, in view of the compelling record showing Respondent's justifications shifted, were exaggerated, and often false strongly indicates pretext such that Respondent is unable to show that it would have discharged Bartolo, at the time that it did, in absence of his protected activity. *Case Farms of N. Carolina, Inc.*, 353 NLRB 257, 259 (2008). Therefore, respectfully, the ALJ should find that Respondent failed to meet its *Wright Line* burden.

5. To be Made Whole, Bartolo Should Be Compensated for Any Consequential Economic Harm He Has Incurred as a Result of Respondent's Unfair Labor Practices

Under the Board's present remedial approach, some economic harms that flow from a respondent's unfair labor practices are not adequately remedied. *See* Catherine H. Helm, *The Practicality of Increasing the Use of Section 10(j) Injunctions*, 7 INDUS. REL. L.J. 599, 603 (1985) (traditional backpay remedy fails to address all economic losses, such as foreclosure in the event of an inability to make mortgage payments). The Board's standard, broadly-worded make-whole order, considered independent of its context, could be read to include consequential economic harm. However, in practice, consequential economic harm is often not included in traditional make-whole orders. *E.g., Graves Trucking*, 246 NLRB 344, 345 n.8 (1979), *enforced as modified*, 692 F.2d 470 (7th Cir. 1982); *Operating Engineers Local 513 (Long Const. Co.),* 145 NLRB 554 (1963). The Board should issue a specific make-whole remedial order in this case, and all others, to require the Respondent to compensate employees for all

consequential economic harms that they sustain, prior to full compliance, as a result of the Respondent's unfair labor practices.

Reimbursement for consequential economic harm, in addition to backpay, is well within the Board's remedial power. The Board has "'broad discretionary' authority under Section 10(c) to fashion appropriate remedies that will best effectuate the policies of the Act." *Tortillas Don Chavas*, 361 NLRB 101, 102 (2014) (citing *NLRB v. J.H. Rutter-Rex Mfg. Co.*, 396 U.S. 258, 262-63 (1969)). The basic purpose and primary focus of the Board's remedial structure is to "make whole" employees who are the victims of discrimination for exercising their Section 7 rights. *See, e.g., Radio Officers' Union of Commercial Telegraphers Union v. NLRB*, 347 U.S. 17, 54-55 (1954). In other words, a Board order should be calculated to restore "the situation, as nearly as possible, to that which would have [occurred] but for the illegal discrimination." *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 194 (1941); *see also J.H. Rutter-Rex Mfg.*, 396 U.S. at 263 (recognizing the Act's "general purpose of making the employees whole, and [] restoring the economic status quo that would have obtained but for the company's" unlawful act).

Moreover, the Supreme Court has emphasized that the Board's remedial power is not limited to backpay and reinstatement. *Virginia Elec. & Power Co. v. NLRB*, 319 U.S. 533, 539 (1943); *Phelps Dodge Corp.*, 313 U.S. at 188-89. Indeed, the Court has stated that, in crafting its remedies, the Board must "draw on enlightenment gained from experience." *NLRB v. Seven-Up Bottling of Miami, Inc.*, 344 U.S. 344, 346 (1953). Consistent with that mandate, the Board has continually updated its remedies in order to make victims of unfair labor practices more truly whole. *See, e.g., Tortillas Don Chavas*, 361 NLRB 101, 104, 105 (revising remedial policy to require respondents to reimburse discriminatees for excess income tax liability

incurred due to receiving a lump sum backpay award, and to report backpay allocations to the appropriate calendar quarters for Social Security purposes); *Kentucky River Medical Center*, 356 NLRB 6, 8- 9 (2010) (changing from a policy of computing simple interest on backpay awards to a policy of computing daily compound interest on such awards to effectuate the Act's make whole remedial objective); *Isis Plumbing & Heating Co.*, 138 NLRB 716, 717 (1962) (adopting policy of computing simple interest on backpay awards), *enforcement denied on other grounds*, 322 F.2d 913 (9th Cir. 1963); *F.W. Woolworth Co.*, 90 NLRB 289, 292-293 (1950) (updating remedial policy to compute backpay on a quarterly basis to make the remedies of backpay and reinstatement complement each other); *see also NLRB v. Mackay Radio & Tel. Co.*, 304 U.S. 333, 348 (1938) (recognizing that "the relief which the statute empowers the Board to grant is to be adapted to the situation which calls for redress"). Compensation for employees' consequential economic harm would further the Board's charge to "adapt [its] remedies to the needs of particular situations so that 'the victims of discrimination' may be treated fairly," provided the remedy is not purely punitive. *Carpenters Local 60 v. NLRB*, 365 U.S. 651, 655 (1961) (quoting *Phelps Dodge*, 313 U.S. at 194); *see Pacific Beach Hotel*, 361 NLRB 709, 719 (2014). The Board should not require the victims of unfair labor practices to bear the consequential costs imposed on them by a respondent's unlawful conduct.

Reimbursement for consequential economic harm achieves the Act's remedial purpose of restoring the economic status quo that would have obtained but for a respondent's unlawful act. *Rutter-Rex Mfg.*, 396 U.S. at 263. Thus, if an employee suffers an economic loss as a result of an unlawful elimination or reduction of pay or benefits, the employee will not be made whole unless and until the respondent compensates the employee for those consequential economic losses, in addition to backpay. For example, if an employee is unlawfully terminated and is

unable to pay his or her mortgage or car payment as a result, that employee should be compensated for the economic consequences that flow from the inability to make the payment: late fees, foreclosure expenses, repossession costs, moving costs, legal fees, and any costs associated with obtaining a new house or car for the employee.[19] Similarly, employees who lose employer-furnished health insurance coverage as the result of an unfair labor practice should be compensated for the penalties charged to the uninsured under the Affordable Care Act and the cost of restoring the old policy or purchasing a new policy providing comparable coverage, in addition to any medical costs incurred due to loss of medical insurance coverage that have been routinely awarded by the Board. *See Roman Iron Works*, 292 NLRB 1292, 1294 (1989) (discriminatee entitled to reimbursement for out-of-pocket medical expenses incurred during the backpay period as it is customary to include reimbursement of substitute health insurance premiums and out-of-pocket medical expenses in make-whole remedies for fringe benefits lost).[20]

Modifying the Board's make-whole orders to include reimbursement for consequential economic harm incurred as a result of unfair labor practices is fully consistent with the Board's established remedial objective of returning the parties to the lawful status quo ante. Indeed, the Board has long recognized that unfair labor practice victims should be made whole for economic losses in a variety of circumstances. *See Greater Oklahoma Packing Co. v. NLRB*, 790 F.3d 816, 825 (8th Cir. 2015) (upholding award of excess income tax penalty announced in *Tortillas Don Chavas* as part of Board's "broad discretion"); *Deena Artware, Inc.*, 112 NLRB 371, 374 (1955)

[19] However, an employee would *not* be entitled to a monetary award that would cover the mortgage or car payment itself; those expenses would have existed in the absence of any employer unlawful conduct.

[20] Economic harm also encompasses "costs" such as losing a security clearance, certification, or professional license, affecting an employee's ability to obtain or retain employment. Compensation for such costs may include payment or other affirmative relief, such as an order to request reinstatement of the security clearance, certification, or license.

(unlawfully discharged discriminatees entitled to expenses incurred in searching for new work), *enforced*, 228 F.2d 871 (6th Cir. 1955); *BRC Injected Rubber Products*, 311 NLRB 66, 66 n.3 (1993) (discriminatee entitled to reimbursement for clothes ruined because she was unlawfully assigned more onerous work task of cleaning dirty rubber press pits); *Nortech Waste*, 336 NLRB 554, 554 n.2 (2001) (discriminatee was entitled to consequential medical expenses attributable to respondent's unlawful conduct of assigning more onerous work that respondent knew would aggravate her carpal tunnel syndrome; Board left to compliance the question of whether the discriminatee incurred medical expenses and, if she did, whether they should be reimbursed); *Pacific Beach Hotel*, 361 NLRB at 719 (Board considered an award of front pay but refrained from ordering it because the parties had not sought this remedy, the calculations would cause further delay, and the reinstated employee would be represented by a union that had just successfully negotiated a collective-bargaining agreement with the employer). In all of these circumstances, the employee would not have incurred the consequential financial loss absent the respondent's original unlawful conduct; therefore, compensation for these costs, in addition to backpay, was necessary to make the employee whole.

The Board's existing remedial orders do not ensure the reimbursement of these kinds of expenses, particularly where they did not occur by the time the complaint was filed or by the time the case reached the Board. Therefore, the Board should modify its standard make-whole order language to specifically encompass consequential economic harm in all cases where it may be necessary to make discriminatees whole.

The Board's ability to order compensation for consequential economic harm resulting from unfair labor practices is not unlimited, and the Board concededly "acts in a public capacity to give effect to the declared public policy of the Act," not to adjudicate discriminatees' private

rights. *See Phelps Dodge Corp. v. NLRB*, 313 U.S. at 193. Thus, it would not be appropriate to order payment of speculative, non-pecuniary damages such as emotional distress or pain and suffering.[21] In *Nortech Waste*, *supra*, the Board distinguished its previous reluctance to award medical expenses in *Service Employees Local 87 (Pacific Telephone)*, 279 NLRB 168 (1986) and *Operating Engineers Local 513 (Long Construction)*, 145 NLRB 554 (1963), as cases involving "pain and suffering" damages that were inherently "speculative" and "nonspecific." *Nortech Waste*, 336 NLRB at 554 n.2. The Board explained that the special expertise of state courts in ascertaining speculative tort damages made state courts a better forum for pursuing such damages. *Id.* However, where—as in *Nortech Waste*—there are consequential economic harms resulting from an unfair labor practice, such expenses are properly included in a make-whole remedy. *Id.* (citing *Pilliod of Mississippi, Inc.*, 275 NLRB 799, 799 n.3 (1985) (respondent liable for discriminatee's consequential medical expenses); *Lee Brass Co.*, 316 NLRB 1122, 1122 n.4 (1995) (same), *enforced mem.*, 105 F.3d 671 (11th Cir. 1996)).[22]

[21] This is in contrast to non-speculative consequential economic harm, which will require specific, concrete evidence of financial costs associated with the unfair labor practice in order to calculate and fashion an appropriate remedy.

[22] The Board should reject any argument that ordering reimbursement of consequential economic harms is akin to the compensatory tort-based remedy added to the make-whole scheme of Title VII by the Civil Rights Act of 1991. *See Landgraf v. USI Film Products*, 511 U.S. 244, 253 (1994). The 1991 Amendments authorized "damages for 'future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other non-pecuniary losses.'" *Id.* (quoting Civil Rights Act of 1991, 42 U.S.C. § 1981a(b)(3)). The NLRA does not authorize such damages. However, even prior to the 1991 Amendments, courts awarded reimbursement for consequential economic harms resulting from Title VII violations as part of a make-whole remedy. *See Pappas v. Watson Wyatt & Co.*, 2007 WL 4178507, at *3 (D. Conn. Nov. 20, 2007) ("[e]ven before additional compensatory relief was made available by the 1991 Amendments, courts frequently awarded damages" for consequential economic harm, such as travel, moving, and increased commuting costs incurred as a result of employer discrimination); *see also Proulx v. Citibank*, 681 F. Supp. 199, 205 (S.D.N.Y. 1988) (finding Title VII discriminatee was entitled to expenses related to using an employment agency in searching for work), *affirmed mem.*, 862 F.2d 304 (2d Cir. 1988).

C. Respondent's Confidentiality Provision Violates the Act

1. Legal Standard

Under a newly adopted standard, the Board will find the maintenance of a facially neutral work policy lawful if the rule cannot reasonably be interpreted as tending to interfere with Section 7 rights, or, if the rule risks interfering with Section 7 rights, but such interference is outweighed by the justifications associated with the rule. *Boeing Company*, 365 NLRB No. 154 (2017) (Category I). Likewise, if a particular type of rule is determined to have a potential adverse impact on protected activity, the Board will find maintenance of the rule unlawful if (1) "individualized scrutiny reveals that the rule's potential adverse impact outweighs any justifications," (Category II) or (2) "the type of rule at issue predictably has an adverse impact on Section 7 rights that outweighs any justifications." (Category III). *Id*. at slip op. 4.

The above categories represent a set of results, and not the test itself in determining whether the maintenance of a work rule is unlawful. *Id*. at slip op. 15. The first step of the inquiry is determining whether, when reasonably interpreted from the perspective of the employee, the rule would potentially interfere with Section 7 rights. *Id*. at slip op. 14. If so, then, the Board will evaluate (1) "the nature and extent of the potential impact on [Section 7] rights," and (2) "legitimate justifications associated with the [rule(s)]." *Id.* When considering the above, the Board will differentiate among the different types of protected activity, finding that some may be "central to the Act and others more peripheral." *Id*. at slip op. 15. Similarly, the Board will differentiate between "substantial justifications – those that have direct, immediate relevance to employees or the business – and others that might be regarded as having more peripheral importance." *Id.*

2. Analysis

As discussed above, Respondent maintains a provision within its employment contracts prohibiting employees from disclosing confidential information including, "employee . . . lists and personnel information of employees" and "numbers and location of sales representatives." Here, the prohibition on disclosing both employee personnel information and the number and location of employees would predictably interfere with Section 7 rights. For example, employees have a right under Section 7 to discuss wages and other benefits that would reasonably be encompassed in "personnel information." Moreover, employees have a right to organize for union representation which would include disclosing information about where other employees are located and how many other employees work in similar positions or have shared interests. Thus, prohibiting employees from disclosing such information has a direct and significant impact on those rights which are at the core of the Act.

Weighing those rights against Respondent's justifications for maintaining the prohibition, in this case, is easy because Respondent did not offer any justifications associated with the rule. Even if Respondent had offered justifications, or a legitimate justification could be adduced from the contents of the employment contract itself, any such justification would likely be held as more peripheral in nature. Thus, because the rights at issue are central to the Act and any legitimate justification would likely be found far less significant, the ALJ should find that Respondent's confidentiality policy violates Section 8(a)(1) of the Act.

V. CONCLUSION

In sum, based on the foregoing, the ALJ should find that Respondent violated the Act as alleged in the Complaint and recommend all appropriate remedies, including a make-whole remedy, reinstatement, rescission of the rule, and a notice to employees.

Proposed Notice to Employees
(To be printed and posted on official Board notice form)

FEDERAL LAW GIVES YOU THE RIGHT TO:

- Form, join, or assist a union;
- Choose a representative to bargain with us on your behalf;
- Act together with other employees for your benefit and protection;
- Choose not to engage in any of these protected activities.

WE WILL NOT do anything to prevent you from exercising the above rights.

YOU HAVE THE RIGHT to invoke the protection of the National Labor Relations Board, including by filing charges and giving testimony to the Board. **WE WILL NOT** do anything to interfere with your exercise of these rights.

WE WILL NOT maintain, in our "Private & Confidential Employment Agreement," or anywhere else, rules that you would reasonably understand to prevent you from disclosing information about our employees or your working conditions in furtherance of your rights under the National Labor Relations Act.

WE WILL NOT tell you that it is futile to file charges or otherwise contact the National Labor Relations Board (the Labor Board).

WE WILL NOT threaten to blackball you from the industry if you engage in protected activity by telling us that you will report the company to the Labor Board.

WE WILL NOT fire you because you engage in protected activity by telling us that you will report us to the Labor Board.

WE WILL NOT in any like or related manner interfere with your rights under Section 7 of the Act.

WE WILL rescind the above rules; and **WE WILL** furnish all former or current employees whom we solicited or required to sign Private & Confidential Employment Agreements incorporating the above rules with inserts stating that the above rules have been rescinded and will be given no force or effect.

WE WILL offer **DANIEL BARTOLO (BARTOLO)** immediate and full reinstatement to his former job, or if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights and privileges previously enjoyed.

WE WILL pay **BARTOLO** for the wages and other benefits he lost because we fired him.

WE WILL within 14 days, remove from our files, any and all records of the discharge of **BARTOLO** and **WE WILL** within 3 days thereafter, notify **BARTOLO** in writing that we have taken this action, and that the materials removed will not be used as a basis for any future

personnel action against him or referred to in response to any inquiry from any employer, employment agency, unemployment insurance office, or reference seeker, or otherwise used against him.

GUBAGOO INC.
(Employer)

Dated: _____ **By:** _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. We conduct secret-ballot elections to determine whether employees want union representation and we investigate and remedy unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below or you may call the Board's toll-free number 1-866-667-NLRB (1-866-667-6572). Hearing impaired persons may contact the Agency's TTY service at 1-866-315-NLRB. You may also obtain information from the Board's website: www.nlrb.gov.

2600 N CENTRAL AVE, STE 1400
PHOENIX, AZ 85004-3019

Telephone: 602-640-2160
Hours of Operation: 8:15 a.m. to 4:45 p.m.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the above Regional Office's Compliance Officer.

CERTIFICATE OF SERVICE

I hereby certify that a copy of **GENERAL COUNSEL'S BRIEF TO THE ADMINISTRATIVE LAW JUDGE** in Cases 28-CA-203713 was served by E-Gov, E-Filing, E-mail on this 24th day of April, 2018, on the following:

Via E-Gov, E-Filing:

Honorable Gerald Etchingham
Associate Chief Administrative Law Judge - Division of Judges
National Labor Relations Board
901 Market Street, Suite 300
San Francisco, California 94103-1779

The Honorable Eleanor Laws
Administrative Law Judge
National Labor Relations Board
Division of Judges, San Francisco Division
901 Market Street, Suite 300
San Francisco, California 94103-1733

Via E-mail:

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Respectfully submitted,

/s/ Sara S. Demirok
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